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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, FEBRUARY 19, 2002

PETITION OF

BIRCHWOOD POWER PARTNERS, L.P.

CASE NO. PUE010719

To operate its qualifying
cogeneration facility under PURPA
as a non-qualifying generating facility
without obtaining a certificate of
public convenience and necessity, or
in the alternative, application for
certificate of public convenience
and necessity

ORDER FOR NOTICE AND COMMENT

On December 20, 2001, Birchwood Power Partners, L.P. ("Birchwood" or "Company"), filed with the State Corporation Commission ("Commission") a petition seeking the Commission to declare that its generating facility ("Facility") located in King George County may cease operation as a qualifying cogeneration facility ("QF") under the Public Utilities Regulatory Policies Act ("PURPA") and commence operation as a non-qualifying electric generating facility without obtaining a certificate of public convenience and necessity ("CPCN") from the Commission. In the alternative, Birchwood proposed that if the Commission finds that a certificate is required, the Company's Petition be treated as an application for a CPCN.

By way of background, and as set forth more fully in the Company's Petition, Birchwood is a limited partnership owned by Mirant Birchwood, Inc. ("Mirant Birchwood"), and Cogentrix/Birchwood Two, L.P. ("CB-Two"). Mirant Birchwood is ultimately owned by Mirant Corporation and CB-Two is ultimately owned by Cogentrix Energy, Inc. Birchwood's Facility (the subject of this Petition) has been operated as a QF pursuant to PURPA since 1996. Thermal

output from the Facility is sold to Greenhost, Inc., which uses such output to operate a greenhouse complex. The steam-turbine generator has a net electric power production capacity of approximately 242.2 MW. All of the electric capacity and energy from the Facility is sold to Virginia Electric and Power Company d/b/a Dominion Virginia Power ("Virginia Power") under a Power Purchase and Operating Agreement ("PPOA") and a Supplemental Capacity Power Purchase and Operating Agreement ("Supplemental PPOA") between Birchwood and Virginia Power.

According to the Petition, the Facility is fully dispatchable, based upon Virginia Power's demand requirements. The Company states that both the PPOA and the Supplemental PPOA explicitly recognize that Birchwood may operate the Facility as a QF or a non-QF electric generating facility. Furthermore, Birchwood states that the PPOA will expire in 2021, unless extended, and that the Supplemental PPOA expires in 2003, unless extended. The Company indicates that both the PPOA and the Supplemental PPOA resulted from bidding procedures implemented by Virginia Power and approved by the Commission. Thus, according to the Company, none of the foregoing is predicated on the Facility maintaining its status as a QF.

The Company also indicates in its Petition that Birchwood has obtained authorization from the FERC to own and operate the Facility as an exempt wholesale generator ("EWG"). Further, the Company states that to operate as a non-QF electric generating facility, Birchwood will also seek FERC approval of its wholesale sales rates.

At the heart of this application is Birchwood's plan to cease operating the Facility as a QF and to operate it instead as a non-QF electric generating facility. Thus, according to the Company, the Facility no longer will be required to meet the technical requirements of a cogeneration QF, producing both steam and electricity for sale, but instead may operate solely as

an electric generating facility. Birchwood believes that, as a matter of law, it is not required to obtain a CPCN from the Commission in order to operate the Facility as a non-QF electric generating facility. Therefore, the Company seeks a declaratory ruling from the Commission that no certificate is required for that purpose. In the alternative, Birchwood states that if the Commission determines that a certificate is required, then the Company requests the Petition be treated as an application to the Commission for a CPCN.

Birchwood argues in its Petition that the Virginia Utility Facilities Act ("Facilities Act"), Va. Code § 56-265.1 et seq., requires a public utility to obtain a certificate in two sets of circumstances, neither of which—in the Company's view—are pertinent to the Company's plans to operate as a non-QF. Birchwood first asserts that Va. Code § 56-265.2 does not apply to it because the Company does not seek to "construct, enlarge, or acquire" any facility. Secondly, the Company contends Birchwood does not have to obtain a certificate under Va. Code § 56-265.3 A, which makes it unlawful for a public utility to furnish public utility service in an exclusive service territory without having first obtained a certificate, because Birchwood is not furnishing traditional "public utility service." Inasmuch as Birchwood (as a non-QF) does not seek to furnish public utility service within an exclusive territory but only intends to operate its electric generating facility to sell to power to Virginia Power for resale under negotiated agreements, the Company argues that this fact lends further weight to its view that the Facilities Act's requirements for certification are inapplicable in these circumstances.

The Company notes in its Petition that the Commission has required certain independent power producers to obtain certificates pursuant to Va. Code § 56-265.2, but not pursuant to Va. Code § 56-265.3, and that the Commission has not issued rules to guide applications to "operate" generation facilities similar to the circumstances presented here. In addition, Birchwood

explains that § 56-577 A 3 of the Virginia Electric Utility Restructuring Act, Va. Code § 56-576 et seq. ("Act"), provides that the generation of electricity shall no longer be subject to regulation under Title 56 other than as specified in the Act. Birchwood points out that the Commission, in the recent case establishing new rules for "merchant plant" electric generation facilities, relied on that provision of the Act in holding that § 56-265.2 will no longer apply to applications to construct new generation in the Commonwealth on and after January 1, 2002.¹ The Company argues that although the Commission limited its ruling in PUE010313 to the impact of the Act on Va. Code § 56-265.2 (and § 56-234.3), the rationale supporting that ruling applies to § 56-265.3 and, thus, Birchwood should not be required to obtain a CPCN in this case. Finally, the Company argues that if the Commission determines a CPCN is required, the operation of the facility as a non-QF would satisfy the "public convenience and necessity" as the Commission has applied that phrase in granting CPCNs to electric generation facilities.

Birchwood's petition raises a number of issues not previously addressed by this Commission. The generating facility in question was constructed and operated as a qualifying cogeneration facility pursuant to PURPA. The Commission did not issue certificates for these facilities at the time they were constructed based on its interpretation of PURPA. The facility now wishes to operate solely as an electric generating facility in the Commonwealth and not as a PURPA-qualified entity, selling power at wholesale to one customer, Virginia Power. Many of the issues brought forth by the Petition involve the scope of the Commission's authority under relevant provisions of the Facilities Act and the Act, particularly, Code §§ 56-265.2, 56-265.3

¹ The Commission established new rules for merchant plant electric generation facilities in Ex Parte: In the matter of amending filing requirements for applications to construct and operate electric generating facilities, Case No. PUE010313, in its Order Adopting Rules And Prescribing Additional Notice, issued December 14, 2001.

and 56-580 D, as well as FERC's authority under various provisions of PURPA and other relevant statutes.

NOW, in consideration of the foregoing, the Commission is of the opinion and finds that this matter should be docketed and interested persons be given notice and provided an opportunity to file comments on Birchwood's Petition.

Significantly, Birchwood is representative of a number of QF facilities in this Commonwealth that were constructed as QFs under the aegis of PURPA and operated as such under PURPA's cogeneration constraints. However, these QF facilities were not required to obtain certificates of public convenience and necessity under Virginia's Facilities Act as a prerequisite to their construction and operation. Consequently, Birchwood's application puts this Commission in the unusual posture of passing on the Facilities Act's certification requirements with respect to a plant that is already sited, constructed, and operational.

Birchwood's legal arguments set forth in its Petition amply demonstrate that neither the Facilities Act nor the Act's "merchant plant" statute (§ 56-580) provide an explicit answer to the overarching legal issue this application presents: What certification or approval, if any, is required from the Commission in conjunction with the transformation of an operational QF facility within the Commonwealth into non-QF facility? Because the outcome of this issue is significant not only to the Company and others like it but also to Virginia's wholesale market in connection with the movement to retail competition, we believe that stakeholders and other parties interested in this issue should be provided an opportunity to comment thereon.

Accordingly, IT IS ORDERED THAT:

(1) This matter is docketed as Case No. PUE010719 and all associated papers shall be filed therein.

(2) On or before March 27, 2002, the Commission Staff and any interested persons may file an original and fifteen (15) copies of written comments on the Petition with Joel H. Peck, Clerk, State Corporation Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. Comments shall refer to Case No. PUE010719. A copy of any comments filed shall also be served on Birchwood's counsel, Edward L. Petrini, Esquire, Christian & Barton, L.L.P., 909 East Main Street, Suite 1200, Richmond, Virginia 23219-3095.

(3) On or before April 9, 2002, the Company may file its response to the comments filed.

(4) The Company shall publish on or before March 4, 2002, as display advertising (not classified) in a newspaper or newspapers of general circulation in King George County, and the Commission Staff shall have published in the next volume of the Virginia Register of Regulations, the following notice:

NOTICE TO THE PUBLIC OF A PETITION BY
BIRCHWOOD POWER PARTNERS, L.P.,
FOR AN ORDER DECLARING THAT IT MAY OPERATE ITS
QUALIFYING COGENERATION FACILITY UNDER PURPA
AS A NON-QUALIFYING GENERATING FACILITY
WITHOUT OBTAINING A CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY, OR IN THE
ALTERNATIVE, APPLICATION FOR CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY
CASE NO. PUE010719

On December 20, 2001, Birchwood Power Partners, L.P. ("Birchwood"), filed a petition with the State Corporation Commission ("Commission") for an order declaring that the Company's electric generation facility located in King George County may cease operation as a qualifying cogeneration facility ("QF") under the Public Utilities Regulatory Policies Act ("PURPA") and commence operation as a non-QF electric generating facility without obtaining a certificate of public convenience and necessity from the Commission. The Petition provides that if the Commission finds that a certificate of public convenience and necessity is needed, Birchwood requests that the

Commission treat the Petition as an application for a certificate of public convenience and necessity.

A copy of the application and other materials may be obtained, at no charge, by making a request in writing to counsel for the Company, Edward L. Petrini, Esquire, Christian & Barton, L.L.P., 909 East Main Street, Suite 1200, Richmond, Virginia 23219-3095. The Petition may also be inspected in the Commission's Document Control Center, Office of the Clerk of the Commission, First Floor, Tyler Building, 1300 East Main Street, Richmond, Virginia, during Commission business hours.

On or before March 27, 2002, any interested person may file comments on the Company's Petition with the Clerk, State Corporation Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218-2118. Such comments shall refer to Case No. PUE010719. Persons wishing to file such comments shall also serve a copy on counsel to the Company, Edward L. Petrini, Esquire, at the address set forth above.

A copy of the Order for Notice and Comment may be obtained from the Clerk of the Commission. The text of the Order may also be viewed at the Commission's website: <http://www.state.va.us/scc/caseinfo/orders.htm>. The Rules of Practice and Procedure and other information may also be viewed on the website.

BIRCHWOOD POWER PARTNERS, L.P.

(5) On or before March 4, 2002, the Company shall serve a copy of this Order on the chairman of the board of supervisors of King George County. Service shall be made by first-class mail or delivery to the customary place of business or residence of the person served.

(6) On or before March 21, 2002, the Company shall file with the Clerk proof of the newspaper publication and proof of service required by ordering paragraphs (4) and (5).